SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~596~~ 24

SOUTHERN CALIFORNIA EDISON COMPANY,
Appellant,

vs.

EL PASO NATURAL GAS COMPANY, et al.,
Appellees.

On Appeal from the United States District Court
for the District of Utah, Central Division

Motions of El Paso Natural Gas Company to Dismiss or Affirm

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SUBJECT INDEX

	Page
Preliminary Statement	1
Other Pending Appeals Presenting Related Questions	2
The Order Appealed From Is Not Reviewable	3
Edison Was Not Entitled to Intervene	5
Conclusion	10

TABLE OF AUTHORITIES CITED

Cases	Pages
Allen Co. v. Cash Register Co., 322 U.S. 137	4
Basle Theatres, Inc. v. Warner Bros. Pictures Distr. Corp., 24 F.R.D. 476 (W.D. Pa.)	6
Brown Shoe Co. v. United States, 370 U.S. 294	4
Continental Ins. Co. v. United States, 259 U.S. 156	4
Ford Motor Co. v. Bisanz Bros., Inc., 249 F.2d 22 (8 Cir.)	5
Missouri-Kansas Pipe Line Co. v. United States, 108 F.2d 614 (3 Cir.)	5
Sam Fox Publishing Co. v. United States, 366 U.S. 683	4, 6
Sutphen Estates v. United States, 342 U.S. 19	4
United States v. California Cooperative Canneries, 279 U.S. 553	4
United States v. DuPont De Nemours & Co., 366 U.S. 316	4
United States v. El Paso Gas Co., 376 U.S. 651	1, 3, 5
United States v. Paramount Pictures, 334 U.S. 131	6
United States v. Radio Corporation of America, 186 F. Supp. 776 (E.D. Pa.), appeal dismissed *sub nom.* Westinghouse Broadcasting Co. v. United States, 364 U.S. 518	4

Statutes and Rules	
Expediting Act, 15 U.S.C. Section 29	3
Revised Rules of the Supreme Court of the United States	
Rule 13(1)	3
Rule 14	3
Rule 16	2
Federal Rules of Civil Procedure, Rule 24	6

Texts	
Moore's Federal Practice, Vol. 4, para. 24.13	6

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PRELIMINARY STATEMENT

This is an appeal by Southern California Edison Company ("Edison") from an order denying its application for leave to intervene in divestiture proceedings taken in the Court below pursuant to the mandate of this Court in *United States v. El Paso Gas Co.*, 376 U.S. 651.[1]

Edison sought to intervene just two days before entry of the Divestiture Decree.

The Decree is now final.

1. The proceedings below were *United States v. El Paso Natural Gas Company, et al.*, Civil No. 143-57 in the United States District Court for the District of Utah, Central Division.

Proceedings are under way before the Federal Power Commission to carry it out.

Edison bases its claim of a right to intervene upon the fact that the Government agreed to the Decree after more than a year of intensive divestiture proceedings and negotiations and Edison is dissatisfied with it.

Pursuant to Rule 16 of the Revised Rules of this Court, Appellee El Paso Natural Gas Company ("El Paso") moves that the appeal be dismissed upon the ground that it is not within the jurisdiction of this Court because not taken in conformity to statute or the Revised Rules of this Court or, alternatively, that the order appealed from be affirmed summarily upon the ground that it is manifest that the questions on which the decision of the appeal depends are so unsubstantial as not to need further argument.

OTHER PENDING APPEALS PRESENTING RELATED QUESTIONS

Cascade Natural Gas Corporation and Mr. William M. Bennett, styling himself "Special Counsel for the People of the State of California," appealed last term from orders of the District Court denying their applications to intervene in the proceedings below.[2]

El Paso moved alternatively to dismiss or affirm in each of these appeals. In support El Paso submitted that under settled principles the orders appealed from are not reviewable and that neither appellant was entitled to intervene. Thereafter El Paso filed two statements supplementing its motions to inform the Court of further occurrences and proceedings in the Court below and the Federal Power Commission. The first such statement advised the Court that the parties to the action had agreed to a Decree and

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2. The appeal of Cascade Natural Gas Corporation is now No. 79, October Term, 1965. Mr. Bennett's appeal is No. 82.

placed a copy before the Court for its information. The second statement informed the Court that the Decree had been entered after notice and an opportunity to be heard was given to each person requesting it, that El Paso and the new corporation established pursuant to the Decree had filed applications with the Federal Power Commission for the certificates and other authorizations necessary to carry out the plan of divestiture contained in the Decree, and that the Federal Power Commission had given notice of the filing of those applications and ordered the applicants to file testimony and hearing exhibits.

To avoid encumbering the files of the Court with unnecessary repetition of what has already been said, we incorporate herein by this reference El Paso's motions and supplementary statements in the two earlier appeals. We address ourselves here to circumstances and authorities peculiar to Edison's appeal which provide further support for our submission that the Edison appeal should be dismissed or that the order denying it leave to intervene should be affirmed summarily.

THE ORDER APPEALED FROM IS NOT REVIEWABLE

Edison has appealed only from the order of the District Court denying its petition to intervene. It did not purport to appeal from the Decree and the Decree is now final.[3]

Review in this case is governed by the Expediting Act (15 U.S.C. § 29, so held in *United States v. El Paso Gas Co.*, 376 U.S. 651, 652). Appeal lies only "from the final

3. Mr. Bennett, appellant in No. 82, is the only person who purported to take an appeal from the Decree itself. His appeal was abandoned by failure to docket within the time provided by Rule 13(1). The Clerk has informed us this period expired September 14, 1965, and the appeal is subject to dismissal pursuant to Rule 14.

judgment of the District Court" and then only to this Court (*United States v. California Cooperative Canneries*, 279 U.S. 553). The statutory purpose and its consequence were recently reiterated in *Brown Shoe Co. v. United States*, 370 U.S. 294, 305 n.9:

> "Congress thus limited the right of review in such cases [subject to the Expediting Act] *to an appeal from a decree which disposed of all matters, and it precluded the possibility of an appeal either to this Court or to a court of appeals from an interlocutory decree.*"

Interlocutory orders in government antitrust litigation denying intervention to strangers have been treated uniformly by this Court as nonreviewable (*E.g. Allen Co. v. Cash Register Co.*, 322 U.S. 137; *United States v. Radio Corporation of America*, 186 F. Supp. 776 (E.D. Pa.), appeal dismissed *sub nom. Westinghouse Broadcasting Co. v. United States*, 364 U.S. 518).

The decisions cited in Edison's jurisdictional statement in support of its contention that this Court has jurisdiction over the appeal (Edison Br. 5-6)[4] are either not in point or hold against reviewability. *Allen Co. v. Cash Register Co., supra*, holds squarely that an order entered before judgment denying an application to intervene in a government antitrust case is not reviewable. In *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, and *Sutphen Estates v. United States*, 342 U.S. 19, both government antitrust actions, this Court dismissed appeals from orders denying intervention. *Continental Ins. Co. v. United States*, 259 U.S. 156, and *United States v. DuPont De Nemours & Co.*, 366 U.S. 316, are not remotely in point because neither involved appealability of an order denying an application

4. Edison's Jurisdictional Statement is cited here "Edison Br. ....." Italics in quoted matter have been supplied.

to intervene. *Ford Motor Co. v. Bisanz Bros., Inc.*, 249 F.2d 22 (8 Cir.), was not an Expediting Act case, and *Missouri-Kansas Pipe Line Co. v. United States*, 108 F.2d 614 (3 Cir.), holds only that in a case subject to the Act no appeal lies to a Court of Appeals.

Urgent reasons of practicality in administration of the antitrust laws on behalf of the public by the Department of Justice require the rule of nonreviewability laid down by the foregoing authorities. Edison is a consumer of natural gas in southern California; it purchases no gas from El Paso (Edison Br. 9). Its interest in this litigation is no different than any other consumer's. Edison sought to rush into the divestiture proceedings below as they were coming to an end, and to start the proceedings all over again, because Edison is dissatisfied with the Decree agreed to by the Department of Justice. If Edison can invoke the appellate jurisdiction of this Court to halt the divestiture "without delay" ordered by the mandate[5] because as a consumer it has gratuitously determined that the Attorney General's agreement with the Decree was "clearly wrong" (Edison Br. 21), then any consumer would have the same right and the Department of Justice would be powerless to exercise its heretofore undoubted statutory power and authority to represent the public interest in cases of this kind.

EDISON WAS NOT ENTITLED TO INTERVENE

Edison's claim of a right to intervene proceeds from the incredible supposition that Edison may properly wrest control of the Government's case from the Attorney General merely because Edison, as a consumer of natural gas, is dissatisfied with the position the Attorney General has taken on behalf of the United States. Edison does not and

5. *United States v. El Paso Gas Co.*, 376 U.S. 651.

could not claim that within the meaning of Rule 24 of the Rules of Civil Procedure there is any statute entitling it to intervene or that it has any interest in property under control of the District Court which would support such a right.

In government antitrust cases this Court has repeatedly rejected the notion that a citizen stranger to the litigation may intervene because he prefers his own conception of the public interest to that advocated by the Department of Justice. *United States v. Paramount Pictures*, 334 U.S. 131, 177, holds:

> "The Department of Justice is the representative of the public in these antitrust suits. So far as the protection of the public interest in free competition is concerned the interests of those intervenors was adequately represented."

Accord: *Sam Fox Publishing Co. v. United States*, 366 U.S. 683.

Edison seeks to explain away the manifest untimeliness of its application made for the first time two days before the Decree was entered by contending that it could not have earlier known that the Government would permit a disposition of the case unsatisfactory to Edison. This is just a reiteration of the fallacy that a citizen may take over representation of the public interest in a government antitrust case at any time he is dissatisfied with the Attorney General's conduct of it.

The claim is even more remarkable in the light of additional circumstances of record showing the dilatory nature of Edison's tactic. The stipulation for entry of the agreed Divestiture Decree filed in the Court below contained an invitation to all persons deeming themselves affected

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6. See *Basle Theatres, Inc. v. Warner Bros. Pictures Distr. Corp.* 24 F.R.D. 476 (W.D. Pa.); 4 Moore's Federal Practice, para. 24.13.

by the Decree to submit their views regarding it to the District Court.[7] Edison took advantage of this opportunity and, on June 11, 1965, addressed an eight-page letter to the District Court commenting adversely upon the Decree.[8] *The letter did not state or even intimate that Edison would claim any right to intervene.*

Eleven days later, and two days before the Decree was entered, Edison filed and purported to serve its application to intervene. The certificate of service attached to the application truthfully states that service was made on June 22 by ordinary mail from Salt Lake City upon counsel for the Government in Washington and El Paso's attorneys in San Francisco. In consequence the attorneys for the parties arrived in the District Court for the noticed hearing upon the Decree without any knowledge that Edison's application had been filed.[9]

The Court below gave all persons in the courtroom a full opportunity to be heard orally with respect to the Decree (Tr. 8). Counsel for Edison argued at length and was permitted to cross-examine the proposed Chief Executive Officer of the new corporation organized pursuant to the Decree (Tr. 39 *et seq.*).[10] Thus Edison was accorded by the

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7. A copy of the stipulation is attached as an exhibit to El Paso's first statement supplementing its motions to dismiss or affirm in Nos. 79 and 82.

8. A copy of Edison's letter is attached as Exhibit A to its application for leave to intervene filed below on June 22, 1965.

9. Reporter's transcript of proceedings in the Court below had on June 24, 1965, at page 7 *et seq.*, cited hereafter "Tr. ....."

10. In the course of his argument counsel for Edison asserted (Tr. 65):

> "We believe that the Decree initially proposed by the Antitrust Department was very much superior to what is covered by the stipulation."

When the Court below and counsel for El Paso pointed out that the Government had not proposed any Divestiture Decree of record, Edison's counsel said (Tr. 66):

> "You will have to give me time to check it, because I am not as familiar with the record as you are."

Court below every right it would have had as a party, except the right to abort the proceedings by starting them all over again as they were coming to a close and the right to obstruct by appealing from the Decree.

Edison's real interest in the proceedings is apparent from the record. During the divestiture hearings it was shown that El Paso is the applicant in certain Federal Power Commission proceedings vigorously contested by Tennessee Gas Transmission Company and its subsidiary, and that a Government witness, later withdrawn at the Government's request, had based his allegedly expert opinions upon engineering studies supplied to him by Tennessee Gas Transmission Company.[11]

At the hearing upon the Divestiture Decree on June 24 last, Edison's counsel attempted (Tr. 12) to intrude these unrelated Commission proceedings into the argument upon divestiture. In answer to a question put by the District Court, Edison's counsel conceded that Tennessee Gas Transmission Company is Edison's agent "for gas supply" (Tr. 13). Edison is the purchaser of certain natural gas which Tennessee's subsidiary seeks Commission authority to transport for Edison and Edison has intervened in the Commission proceedings in opposition to El Paso's application.

Edison's interest here is the same. It seeks to reopen and otherwise obstruct divestiture proceedings taken pursuant to the mandate of this Court in the interest of El Paso's adversaries, including Edison, in an entirely different regulatory proceeding.

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11. Reporter's transcript of proceedings had on December 10, 1964, pp. 509 *et seq.*

At the hearing upon the Decree, counsel for the United States[12] made this succinct and determinative statement on the Government's behalf in open Court (Tr. 67):

> "The decree submitted to the Court with the consent of the Government, in our judgment, will carry out the mandate of the Supreme Court. And your Honor will recall the principal objection we made to the plan of divestiture originally proposed by El Paso was that it would not insure the complete economic separation between the two companies. And we feel the decree now before your Honor accomplishes that essential objective of the Department of Justice in that the ownership of the two companies will not be the same, that the court-appointed trustee and the chief executive officer and independent management will be separate and independent from El Paso as far as we have been able to ascertain, and we make it clear that we have talked to all three of the gentlemen who will serve as officers, and we have confidence of their integrity and their independence; and, on balance, we would like to say that the decree in our judgment would carry out the mandate of the Supreme Court, and, under the circumstances, *we feel it is necessary that the case get on and get completely disposed of as soon as possible.*[13]

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12. The Second Assistant Attorney General in the Antitrust Division of the Department of Justice.

13. In its jurisdictional statement Edison repeatedly attempts to impeach the integrity of this statement through references (*eg.* Edison Br. 20) to remarks attributed *in the press* to unidentified "representatives" of the Government. We make no comment upon argument of this kind, beyond noting its patent impropriety as an effort to establish outside the record that which the record affirmatively denies.

CONCLUSION

The appeal should be dismissed or the order appealed from summarily affirmed.

Respectfully submitted,

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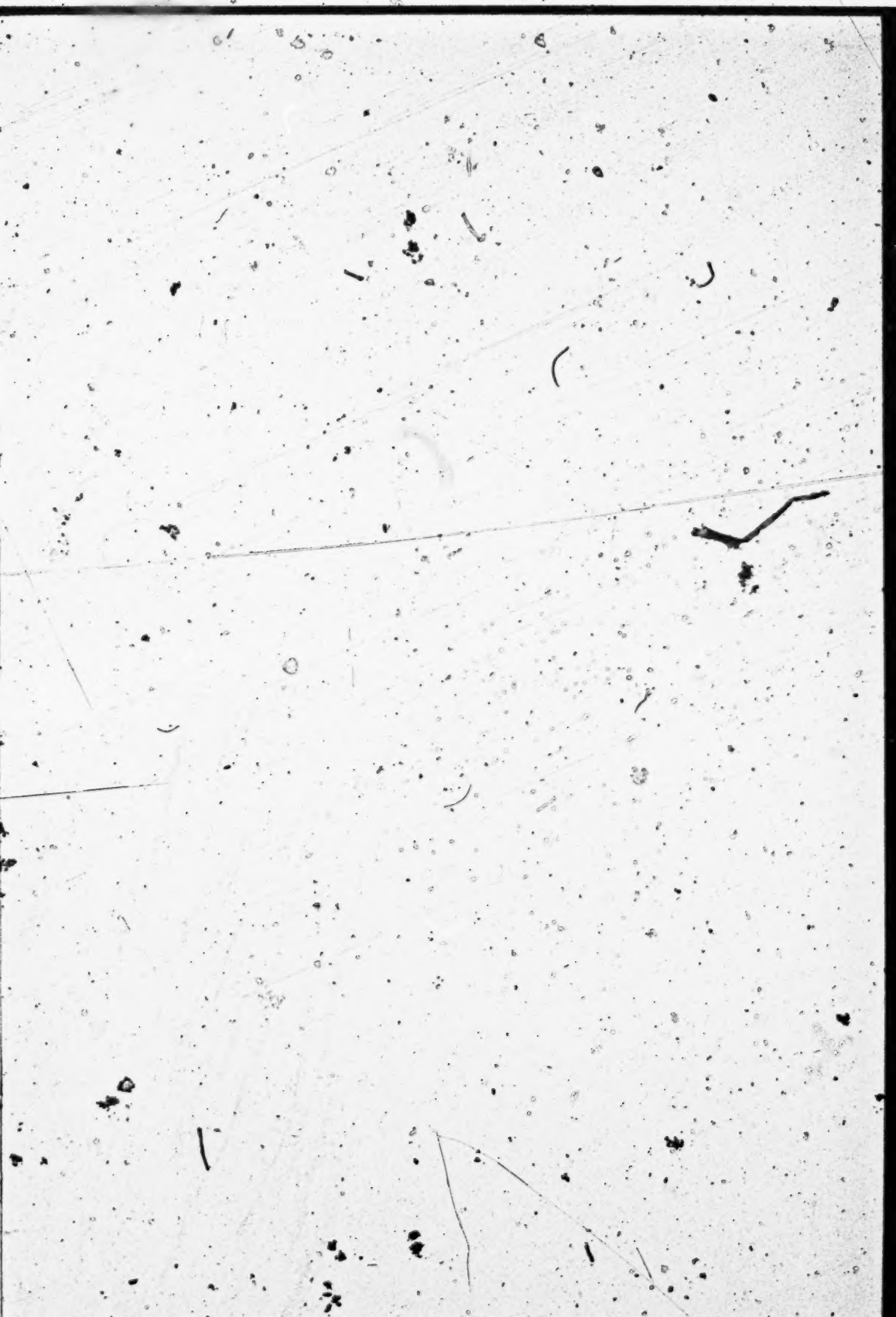

In the Supreme Court of the United States

OCTOBER TERM, 1965

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SOUTHERN CALIFORNIA EDISON COMPANY, APPELLANT

v.

EL PASO NATURAL GAS COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

MOTION OF THE UNITED STATES TO DISMISS

Pursuant to Rule 16 of the Rules of this Court, the United States moves that the appeal in this case be dismissed.

STATEMENT

This is a direct appeal under the Expediting Act, 15 U.S.C. 29, as amended, from an order of the district court (J.S. App. 1) denying appellant leave to intervene in the divestiture proceedings conducted pursuant to this Court's decision and mandate in